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# SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1953**

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# No. 217

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SUPERIOR FILMS, INCORPORATED

*Appellant,*

*vs.*

DEPARTMENT OF EDUCATION OF THE STATE OF OHIO, DIVISION OF FILM CENSORSHIP, CLYDE HISSONG, SUPERINTENDENT

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## STATEMENT AS TO JURISDICTION

Pursuant to Supreme Court Rule 12, Superior Films, Inc., the above appellant, files this, its statement particularly disclosing the basis on which appellant contends that the Supreme Court has appellate jurisdiction to review on appeal the judgment appealed from herein as follows:

### Statute Sustaining Jurisdiction

The statute believed to sustain appellate jurisdiction is section 1257 of Title 28 of the United States Code, which provides that final judgments or decrees rendered by the highest court of a state in which a decision could be had may be reviewed by the United States Supreme Court by appeal "where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the

Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

## Statutes Involved

The statutes of the State of Ohio, the validity of which are involved, are Sections 154-47—154-47i, both inclusive, of the General Code of Ohio set forth in Title III, Chapter 1A at pages 63, 64 and 65 of Throckmorton's Ohio Code Annotated, Baldwin's 1948 Revision. The following are the pertinent parts of the code sections relating to the questions presented:

*Section 154-47.* "It shall be the duty of the department of education to examine and censor as herein provided, all motion picture films to be publicly exhibited and displayed in the State of Ohio, except motion picture trailers, all of the scenes of which are included in a previously censored film. Such films shall be submitted to the department and passed and approved by it before they shall be delivered to the exhibitor for exhibition. The department shall charge a fee of three dollars for each reel of film to be censored which does not exceed one thousand linear feet or fractional part thereof. All moneys so received shall be paid each week into the state treasury to the credit of the general revenue fund, except as otherwise provided in section 154-47a of the General Code. Any person, firm or corporation who shall publicly exhibit motion picture trailers exhibiting scenes ordered deleted by the department of education or exhibiting scenes which were not included as a part of the motion picture which it advertises, at the time it was censored, shall be subject to the penalty provisions of section 154-47e of the General Code."

*Section 154-47a.* "Fifty per cent of all moneys received from the motion picture license fees collected under the provisions of section 154-47 of the General Code, in excess of such amount as shall be necessary to pay the operating expenses, including salaries, of the division

of film censorship shall be paid into a fund to be used by the superintendent of public instruction for disseminating information relative to the history, scenic beauties, natural resources, and industries of Ohio through the office of the director of visual education of the division of public instruction, department of education, and for the creation, maintenance, administration and regulation of a suitable collection of visual aids for loan to the educational institutions of Ohio. The total sum so set aside annually from the fees collected under section 154-47 of the General Code are hereby and hereafter appropriated to the controlling board for the use of the department of education. Such funds shall be expended only upon the authority of vouchers approved by the superintendent of public instruction and no expenditure from such funds may be made except for the purposes enumerated in this section."

*Section 154-47b.* "Only such films as are in the judgment and discretion of the department of education of a moral, educational or amusing and harmless character shall be passed and approved by such department. * * * The department of education shall be authorized to recall any film for recensoring or to revoke any certificate permitting the exhibition of any film in the state of Ohio, whenever in the judgment of the department of education the public welfare requires it. Before any motion picture film shall be publicly exhibited all eliminations ordered by the department of education shall have been made by the person or persons loaning, renting or leasing such film or films to the exhibitor for exhibition. * * * "

Sections 154-47e and 154-47g contain the applicable penalty and enforcement provisions.

## Date of Judgment and Petition for Appeal

1. The judgment of the Supreme Court of Ohio appealed from was entered on the 29th day of April, 1953.

2. A petition for the allowance of an appeal herein was presented on the 26th day of June, 1953.

## Nature of the Case

1. The plaintiff is the producer and the owner of a motion picture entitled "M". Pursuant to the provisions of Ohio G. C. Section 154-47 and Ohio G. C. Section 154-47b requiring that all motion picture films to be publicly exhibited and displayed in the State of Ohio must first be submitted to the Department of Education and passed and approved by it before they may be exhibited in the state, plaintiff on September 11, 1952, submitted to defendant a print of said motion picture consisting of ten reels and paid the required fee of $30.00 for the viewing and censorship thereof. On September 16, 1952, the defendant rejected said film for distribution and exhibition in the State of Ohio for the reasons and upon the grounds that, in the opinion of said defendant, said motion picture "M" is "harmful," as was more fully set forth in defendant's Certificate of Censorship No. 392.

Pursuant to Ohio G. C. Section 154-47h, plaintiff filed in the Supreme Court of the State of Ohio its action to vacate and set aside the order of the Department of Education, Division of Film Censorship, rejecting said film for distribution and exhibition in the State of Ohio. With the approval of the Supreme Court of Ohio, plaintiff filed its amended petition to which the defendant filed its answer following which a stipulation of certain material facts was filed, the questions of law briefed and argued before the Court. The Supreme Court of Ohio rendered its decision in favor of the defendant and against the plaintiff as will more fully appear in the opinion of said court, a copy of which marked Exhibit "A" is appended hereto and which opinion is reported in 159 Ohio State Reports, page 315.

2. The decision of the Court was such as to bring the case within the jurisdictional provisions relied upon in that

five questions under the Constitution of the United States are thereby raised and by this appeal presented.

These questions are:

(1) Whether the censoring statutes of the State of Ohio are invalid on their face as a prior restraint of freedom of speech and press in violation of the First Amendment made applicable to the several states by the Fourteenth Amendment of the Constitution of the United States.

(2) Whether said statutes which authorize a prior restraint on and censoring of the freedom of speech and of the press for which the criteria are the terms "moral, educational or amusing and harmless" and which authorize the revocation of any certificate of approval issued if "the public welfare requires it" are on their face and as applied to plaintiff indefinite and vague standards incompatible with and repugnant to the requirements of the First and Fourteenth Amendments of the Constitution of the United States.

(3) Whether the statutes involved in that they require the prior censorship of motion pictures are a discriminatory denial of equal protection of law under the Fourteenth Amendment to the Constitution of the United States.

(4) Whether said statutes to the extent that they provide for the payment of a fee prior to the distribution and exhibition of motion pictures impose an undue burden on the distribution and exhibition of motion pictures.

(5) Whether as applied to bar the exhibition of motion picture "M" said statutes are repugnant to the First and Fourteenth Amendments of the Constitution of the United States.

Each of said questions was decided in favor of the validity of said statutes, and in deciding said questions in favor of defendant and against plaintiff, the Supreme Court of

Ohio relied upon *Mutual Film Corp* v. *Industrial Commission of Ohio*, 236 U. S. 230, 59 L. Ed. 552; *Joseph Burstyn, Inc.* v. *Wilson, Commissioner*, 343 U. S. 495, 500, 96 L. Ed. 1098; *Near vs. Minnesota, ex rel. Alson*, 283 U. S. 697; *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 571, 86 L. Ed. 1031, 1034; *Commercial Pictures Co-op* v. *Regents of University of New York*, 114 N. Y. Supp. (2d) 561.

## The Questions Are Substantial

I. Although conceding that expression by means of motion pictures is included within the freedom of speech and the press guaranty of the First Amendment to the Federal Constitution, the Supreme Court of Ohio has held that the statutes in question, which require prior approval as a condition precedent to exhibition are nevertheless valid and in no way violative of the Federal constitutional guarantees of freedom of speech and of the press. The Court further held that the Federal Constitution does not guarantee "absolute freedom to exhibit motion pictures of every kind at all times and in all places." No one at any time urged upon the Court that there were not limits of time and place within which the legislature might validly impose restrictions with respect to the exhibition of motion pictures. Indeed the point was fully briefed for the purpose of distinguishing the cases relative to regulating volume, time and place of expression from cases discussing regulation of the content of expression. In so holding, the Court merely rendered a decision based upon hypothetical questions which were not in the case. But to hold that under the statutes here involved the state can validly prohibit the exhibition of the motion picture "M" because the content thereof does not in the opinion of the Censor Board measure up to the standards fixed by the statutes is quite another thing. Into the field of prior restraint upon man's expres-

sion, the State cannot constitutionally go. *Lovell* v. *Griffin*, 303 U. S. 444, 452, 82 L. Ed. 949, 954. *Near* v. *Minnesota*, 283 U. S. 697, 711, 713, 714. Report on the Virginia Resolutions, Madison's Works Vol. 4, Page 544. *Hannegan, Postmaster General* v. *Esquire, Inc.*, 327 U. S. 146, 157, 158, 90 L. Ed. 586, 593. *Gelling* v. *Texas*, 343 U. S. 960, 961. *Joseph Burstyn, Inc.* v. *Wilson*, 343 U. S. 495.

II. Whether the statutes here considered prescribe a standard of restraint too vague to satisfy the constitutional guarantees presents a very substantial question. The statute, Sec. 154-48b, provides that "only such films as are in the judgment and discretion of the Department of Education of a moral, educational or amusing and harmless character shall be passed and approved." The censors rejected the picture "M" upon the grounds that it is "harmful." Criteria so vague and indefinite as these provide no standards at all. What is that which is "harmful"? It is only that which an administrative agent of the state says is harmful. What is harmful to one may be harmless to another. Here indeed is the censor "adrift upon a boundless sea amid a myriad of conflicting currents . . . with no charts but those provided by the most vocal and powerful . . ." *Burstyn* v. *Wilson*, 343 U. S. 495. The vesting of such power, to be applied to testing the content of the motion picture expression, without explicit guides, with the resulting unpredictable, shifting system of standards is prohibited by the Constitution of the United States. *Hague* v. *C. I. O.*, 307 U. S. 496, 83 L. Ed. 1423; *Cantwell* v. *Connecticut*, 310 U. S. 296, 84 L. Ed. 1213; *Saia* v. *New York*, 334 U. S. 558, 92 L. Ed. 1574; *Kunz* v. *New York*, 340 U. S. 290, 95 L. Ed. 280; *Niemotko* v. *Maryland*, 340 U. S. 268, 95 L. Ed. 267; *Gelling* v. *Texas*, 343 U. S. 960, 96 L. Ed. 896. Indeed the scope of the censor's power is not exhausted when the initial tests are applied because Sec. 154-47b further authorizes the Department "to recall any film for re-

censoring or to revoke any certificate permitting the exhibition of any film . . . whenever in the judgment of the department of education, the public welfare requires it." This power alone is enough to void the statute.' *Jones* v. *Opelika*, 319 U. S. 103, 87 L. Ed. 1290.

III. The third substantial question presented by this appeal is whether these statutes which require the prior censorship of motion pictures is a discriminatory denial of equal protection of law in the face of the fact that motion pictures may be shown on national or local broadcasts of television without such censorship. Indeed censorship of television broadcasts of motion pictures has expressly been held unconstitutional. *Dumont Laboratories* v. *Carroll*, 184 F. 2d 153 (C. A., 3d). Censorship applied to only one of the media or vehicles of expression or communication while not to others such as radio, television, or televising of motion pictures, and newspapers purports to set up a classification without any reasonable basis of different characteristics. Such an arbitrary and capricious differentiation, as a matter of will not of reason, is invalid as a denial of equal protection of the law. *Shelley* v. *Kraemer*, 334 U. S. 1, 92 L. Ed. 1161; *Murdock* v. *Pennsylvania*, 319 U. S. 108, 87 L. Ed. 1292; *Hague* v. *C. I. O.*, 307 U. S. 496, 83 L. Ed. 1423; *Hale et al.* v. *Bimco Trading, Inc., et al.*, 306 U. S. 357, 83 L. Ed. 771.

IV. A fourth substantial question presented by the appeal is whether the licensing fees required to be paid prior to the submission of any film for censorship is a constitutional tax upon property under the Federal Constitution. Over the past ten years fees have been collected by the Department of Education in amounts which exceed by 500% to 1400% the operating costs of the Division of Film Censorship. The surplus over the cost of operating the Division is paid one-half to the General Fund of the State and one-half to the Rotary Fund in support of visual educa-

tion. Thus the so-called fees are simply an excise tax, and since it is a tax only upon motion pictures and not upon other media of expression in the State of Ohio, and is imposed in a manner different from general taxes upon property or income, it clearly constitutes a form of prior restraint and violates the constitutional guarantees of freedom of speech and press under the First Amendment to the Federal Constitution and violates the equal protection and due process clauses of the Fourteenth Amendment thereto. *Grosjean* v. *American Press Co.*, 297 U. S. 233, 80 L. Ed. 660; *Murdock* v. *Pennsylvania*, 319 U. S. 105, 87 L. Ed. 1292; *Youngstown Steel and Tube Co.* v. *Youngstown*, 91 O. App. 431. Such a flagrant violation of constitutional protection should be corrected.

V. A fifth substantial question presented by this appeal lies in the fact that, in applying Ohio's censorship statutes to ban the picture "M", the censors acted so unreasonably and arbitrarily as to constitute their action unconstitutional even if the statutes under which they acted were constitutional, which the plaintiff denies. Here is a plain example of the unconstitutional exercise of delegated power, even if the validity of the delegated power were conceded. It is clear that any limitation by the state upon the liberty of speech and press must, in order to avoid unconstitutionality, have appropriate relation to the safety of the state. Such must be shown as a matter of evidence to justify the application of the limitation. In view of the fact that the Supreme Court of Ohio did not view the film, it is difficult to comprehend how they could have intelligently passed upon its content and could have concluded that there was enough evidence to justify their conclusion that the censors had not acted unreasonably or arbitrarily. Moreover, under the statutes in question, the Supreme Court of Ohio is vested with the exclusive jurisdiction to hear and determine all actions brought by dissatisfied producers and exhibitors to

vacate orders of the Department of Education rejecting motion pictures from exhibition because such orders are unreasonable or unlawful. If the court without any independent appraisal of the picture, accepts the judgment and decision of the censor board as being final and conclusive, as was done in this instance, the remedial language of the statute is a mere nullity. Such statutes which permit of such results, should be struck down as violative of the First and Fourteenth Amendments to the Federal Constitution. *Fiske* v. *Kansas*, 274 U. S. 380, 71 L. Ed. 1108; *Herndon* v. *Lowry*, 301 U. S. 242, 81 L. Ed. 1066; *Taylor* v. *Mississippi*, 319 U. S. 583, 87 L. Ed. 1600.

Briefly, the motion picture drawn in question here, if viewed would reveal the following. The picture "M" was produced by Seymour Nebenzal, an acknowledged artist in his field. The story is laid in a metropolitan city in which there is at large a psychopathic character, previously but prematurely dismissed from a mental hospital who is driven by a mental fixation. He is driven to kill small girls so as to protect them from the evil world of men. The police immediately go into action. In order to avoid police raids on the underworld, the local racketeers organize to capture the psychopathic baby killer for whom contemporaneously the police are searching. Although the police effect the final arrest, it is the widely organized racketeer element that manages to discover the trail and capture the demented baby killer. No actual murders of children are shown, and it is made clear that there is no "sex" angle involved. The film clearly points up, first, our inadequate hospital facilities which permit premature dismissal of mental patients and, second, the risks incurred by neglectful parents who permit small children to roam unattended on the public streets. It further dramatizes a warning to the apathetic public that through the use of money and force, a criminal syndicate can develop in a metropolitan city a more effi-

ciently organized group than the enforcers of law and order. In addition there is a clear plea for public understanding, first, of the limitations in personnel and money upon any police force and, second, the patient, slogging dedicated job the police must do when faced with the new or unconventional criminal. Finally, and above all, the climax and the point of this motion picture, found in a "confession", so to speak, of the central character eloquently describes the conditions and forces that slowly twisted his mind—the broken home, a vindictive parent, the oversensitive spirit, the poverty, the groping for a solution, and the conclusion he reached as to what appeared to him to be the only conduct possible. This passage, indeed the entire movie, seeks to gain popular understanding that mental illness has concrete environmental causes and solutions and thus efforts to remedy this problem are deserving of support. While the theme may be harrowing to some, it is produced in such manner as to present a compelling dramatization of the story told through the artful use of camera, characterization, and music. To anyone who has viewed the film, the comments of the censors (rejection certificate No. 392) must indicate an entire lack of judgment on their part or an inability to comprehend and evaluate the picture as an integrated document of social significance. If, as the Supreme Court of Ohio concedes, the motion picture is within the speech and press protection of the First Amendment and the liberty protected by the Fourteenth Amendment, statutes so applied as to prohibit the exhibition of this motion picture are repugnant to the Constitution.

**The Constitutional Questions Were Timely Raised**

Under Ohio G. C. Sections 154-47—154-47i, inclusive, when any person in interest seeks to challenge the validity of any ruling by Ohio's censors, there is no provision for any hearing, administrative or judicial, at any stage of the

proceeding to secure approval of a motion picture, except for that provided by G. C. Section 154-47h. Section 154-47h vests exclusive jurisdiction in the Supreme Court of Ohio to review the actions taken by the censors. Thus the first opportunity to raise any legal question is in the petition for review filed in this Court. The further steps subsequent to the filing of the petition are reviewed herein above. Each question noted above was raised in the petitions filed by the plaintiff and ruled upon by the Supreme Court of Ohio. See its opinion, exhibit "A", appendix and the assignment of errors.

Respectfully submitted,

FRANCIS J. WRIGHT,
*Counsel for Appellant.*

JOHN C. GARLORD,
MICHAEL GEEAS,
*Of Counsel.*

# APPENDIX "A"

## Opinion of the Supreme Court of Ohio

Hart, J.:

The plaintiff in case No. 33265 submits that the question presented is whether "motion pictures, as distinguished from other media of human expression, may be subjected to censorship in advance of publication; or, whether motion pictures, along with such other media, are entitled to protection from all restraint except such as is incident to responsibility for abuse."

On the other hand, the defendant states his basic position as follows:

"The impact of the motion picture, the unrestricted audience, and the subject matter of those films which experience shows have been rejected, taken together present an area of proper interest for Ohio and an area which can be constitutionally regulated. The standards of regulation under this statute have acquired in this court and through administrative experience a definiteness which complies with procedural due process of law. The Division of Film Censorship acted reasonably and within the proper bounds of its discretion in rejecting the motion picture 'M'. The question of the tax or license characteristics of the fee provided is regarded as a separate and collateral question. It is plainly a license fee though some surplus revenue has been produced. Irrespective of that, however, plaintiff voluntarily paid the fee and by all ordinary principles of law should be estopped from making his voluntary act the basis for a constitutional challenge."

In 1913, the Ohio General Assembly adopted a motion picture censorship act providing for a Board of Censors to operate under the authority and supervision of the Industrial Commission. Section 871-48, General Code, a part of the act, provided that "it shall be the duty of the Board of Censors to examine and censor as herein provided, of motion picture films to be publicly exhibited and displayed in the State of Ohio."

Section 871-49 provided that "only such films as are in the judgment and discretion of the Board of Censors of a moral, educational or amusing and harmless character shall be passed and approved by such board."

In 1935, the censorship body was designated as the "Division of Film Censorship of the Department of Education" (116 Ohio Laws, 100). In 1943, Section 871-48, General Code, became present Section 1554-47, General Code, and Section 871-49, General Code, became present Section 154-47b, General Code (120 Ohio Laws, 481), but the language of the statutes as above quoted has remained practically the same.

In 1914, the constitutionality of the Ohio censorship act, as above noted, was under consideration by the Supreme Court of the United States in the case of *Mutual Film Corp. v. Industrial Commission of Ohio,* 236 U. S. 230, 59 L. Ed. 552, 35 S. Ct. 387, Ann. Cas. 1916C, 296.

In that case the act was attacked from three standpoints as follows: (1) That the act was in violation of Sections 5, 16 and 19 of Article I of the Constitution of Ohio in that it deprived an applicant of due process of law by placing in the board of censors the power to determine from standards fixed by itself what films conformed to the statute; (2) that the act was in violation of Articles I and XIV of the Amendments to the Constitution of the United States, and of Section 11 of Article I of the Constitution of Ohio, in that it restrained applicant and other persons from freely writing and publishing their sentiments; and (3) that the act attempted to give the board of censors legislative power, which is vested only in the General Assembly, in that it gave to the board the power to apply the act without fixing any standard by which the board should be guided in its determination.

The court there held legislative power is not delegated and the freedom of speech and publication guaranteed by Section 11, Article I of the Ohio Constitution, is not violated by the provisions of Sections 154-47 to 154-47i, inclusive, General Code, creating a board of censors which is required to examine and censor prior to exhibition motion picture films intended to be publicly exhibited and

displayed in the state, and to pass and approve only such films are are, in its judgment, of a moral, educational, or amusing and harmless character.

In that case Justice McKenna said:

"* * * Films of a 'moral, educational or amusing and harmless character shall be passed and approved' are the words of the statute. No exhibition, therefore, or 'campaign' of complainant will be prevented if its pictures have those qualities. Therefore, however missionary of opinion films are or may become, however educational or entertaining, there is no impediment to their value or effect in the Ohio statutes. But they may be used for evil, and against that possibility the statute was enacted. Their power of amusement and, it may be, education, the audiences they assemble, not of women alone nor of men alone, but together, not of adults only, but of children, make them the more insidious in corruption by a pretense of worthy purpose or if they should degenerate from worthy purpose. Indeed, we may go beyond that possibility. They take their attraction from the general interest, eager and wholesome it may be, in their subjects, but a prurient interest may be excited and appealed to. Besides, there are some things which should not have pictorial representation in public places and to all audiences. And not only the state of Ohio but other states have considered it to be in the interest of the public morals and welfare to supervise moving picture exhibitions. We would have to shut our eyes to the facts of the world to regard the precaution unreasonable or the legislation to effect it a mere wanton interference with personal liberty.

"* * *

"* * * It cannot be put out of view that the exhibition of moving pictures is a business pure and simple, originated and conducted for profit, like other spectacles, not to be regarded, nor intended to be regarded by the Ohio Constitution, we think, as part of the press of the country or as organs of public opinion. They are mere representations of events, of ideas and sentiments published and known, vivid, useful and entertaining no doubt, but, as we have said, capable of evil, having power for it, the greater because of their attractiveness and manner of exhibition. It

was this capability and power, and it may be in experience of them, that induced the state of Ohio, in addition to prescribing penalties for immoral exhibitions, as it does in its Criminal Code, to require censorship before exhibition, as it does by the act under review. We cannot regard this as beyond the power of government."

The plaintiff asserts that the free speech and press guaranty of the First Amendment to the Constitution of the United States is secured from infringement by the state by the Fourteenth Amendment to that Constitution, and that the guaranties of Sections 2 and 11, Article I of the Constitution of Ohio, are coextensive therewith (*Joseph Burstyn, Inc.* v. *Wilson, Commr.*, 343 U. S. 495, 500, 96 L. Ed. 1098, 72 S. Ct. 777; *Direct Plumbing Supply Co.* v. *City of Dayton*, 138 Ohio St. 540, 38 N. E. (2d) 70, 137 A. L. R. 1058); and that motion pictures are a mode of expression entitled to the same protection as "speech" and "the press" (*Burstyn, Inc.* v. *Wilson, Commr., supra; Gelling* v. *Texas*, 343 U. S. 960, 96 L. Ed. 1359, 72 S. Ct. 1002; *United States* v. *Paramount Pictures, Inc.*, 334 U. S. 131, 166, 92 L. Ed. 1260, 1297, 68 S. Ct. 915). Upon that premise plaintiff then contends that Sections 154-47 to 154-47i, inclusive, General Code, are an unconstitutional prior restraint upon the exhibition of motion pictures equivalent to prior restraint upon freedom of speech and the press.

Chief reliance in support of plaintiff's position is placed upon the recent pronouncement of the Supreme Court of the United States in the case of *Burstyn, Inc.*, v. *Wilson, Commr., supra*, decided May 26, 1952, in which was reversed the judgment of the Court of Appeals of New York (303 N. Y. 242, 101 N. E. (2d) 665). In that case a license for the exhibition of a motion picture entitled "The Miracle" was rescinded by the appropriate New York authorities on the ground that the picture was "sacrilegious" within the meaning of the statute requiring the denial of a license if a film is "obscene, indecent, immoral, inhuman, sacrilegious, or is of such a character that its exhibition would tend to corrupt morals or incite to crime." The statute was upheld by the New York state courts but the United States Supreme Court reversed by a unanimous decision. The Court based

its reversal solely on the ground that the New York statute is an "unconstitutional abridgement of free speech and a free press."

The court in that case, after reviewing an Ohio motion picture case decided by it almost 40 years ago (*Mutual Film Corp.* v. *Industrial Commission of Ohio, supra*), said:

"In a series of decision beginning with *Gitlow* v. *New York*, 268 U. S. 652 (1925) (and including *Stromberg* v. *California*, 283 U. S. 359, 368; *Near* v. *Minnesota, ex rel. Alson*, 283 U. S. 697, 707; *Grosjean* v. *American Press Co.*, 297 U. S. 233, 244; *DeJong* v. *Oregon*, 299 U. S. 353, 364; *Lovell* v. *Griffin*, 303 U. S. 444, 450; *Schneider* v. *State*, 308 U. S. 147, 160), this court held that the liberty of speech and of the press which the First Amendment guarantees against abridgement by the federal government is within the liberty safeguarded by the due process clause of the Fourteenth Amendment from invasion by state action. That principle has been followed and reaffirmed to the present day. Since this series of decisions came after the *Mutual* decision, the present case is the first to present squarely to us the question whether motion pictures are within the ambit of protection which the First Amendment, through the Fourteenth, secures to any form of 'speech' or 'the press.'"

Further excerpts from the opinion reveal the points stressed and the attitude of the court on the whole subject.

The court continued:

"It is further urged that motion pictures possess a greater capacity for evil, particularly among the youth of a community, than other modes of expression. Even if one were to accept this hypothesis, it does not follow that motion pictures should be disqualified from First Amendment protection. If there be capacity for evil it may be relevant in determining the permissible scope of community control, but it does not authorize substantially unbridled censorship such as we have here.

"For the foregoing reasons, we conclude that expression by means of motion pictures is included within the free speech and free press guaranty of the First and Fourteenth

Amendments. To the extent that language in the opinion in *Mutual Film Corp.* v. *Industrial Commission, supra*, is out of harmony with the views here set forth, we no longer adhere to it." See *United States* v. *Paramount Pictures, Inc.*, 334 U. S. 131, 166, 92 L. Ed. 1260, 1297, 68 S. Ct. 915.

The court further said:

"To hold that liberty of expression by means of motion pictures is guaranteed by the First and Fourteenth Amendments, however, is not the end of our problem. It does not follow that the Constitution requires absolute freedom to exhibit every motion picture of every kind at all times and all places. That much is evident from the series of decisions of this court with respect to other media of communication of ideas (citing *Feiner* v. *New York*, 340 U. S. 315; *Kovacs* v. *Cooper*, 336 U. S. 77; *Chaplinsky* v. *New Hampshire*, 315 U. S. 568; *Cox* v. *New Hampshire*, 312 U. S. 569). Nor does it follow that motion pictures are necessarily subject to the precise rules governing any other particular method of expression. Each method tends to present its own peculiar problems. But the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary. Those principles, as they have frequently been enunciated by this court, make freedom of expression the rule. There is no justification in this case for making an exception to that rule.

"• • • It was further stated (in *Near* v. *Minnesota, ex rel. Olson, County Atty., supra*) that 'the protection even as to previous restraint is not absolutely unlimited. But the limitation has been recognized only in exceptional cases.' *Id.*, at 716. In the light of the First Amendment's history and of the *Near* decision, the state has a heavy burden to demonstrate that the limitation challenged here presents such an exceptional case."

The court then discussed as follows the character of the New York statute and its application:

"In seeking to apply the broad and all-inclusive definition of 'sacrilegious' given by the New York courts, the censor is set adrift upon a boundless sea amid a myriad of conflicting currents of religious views, with no charts but those

provided by the most vocal and powerful orthodoxies. New York cannot vest such unlimited restraining control over motion pictures in a censor. Cf. *Kunz* v. *New York*, 340 U. S. 290 (1951). Under such a standard the most careful and tolerant censor would find it virtually impossible to avoid favoring one religion over another, and he would be subject to an inevitable tendency to ban the expression of unpopular sentiments sacred to a religious minority. * * *

"Since the term 'sacrilegious' is the sole standard under attack here, it is not necessary for us to decide, for example, whether a state may censor motion pictures under a clearly drawn statute designed and applied to prevent the showing of obscene films. That is a very different question from the one now before us."

It will be noted that in the *Near* case the Supreme Court stated that "the primary requirements of decency may be enforced against obscene publication," and in the case of *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 571, 86 L. Ed. 1031, 1034, 62 S. Ct. 766, Justice Murphy, speaking for a unanimous Court, said: "There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace."

In the case of *Commercial Pictures Corp.* v. *Regents of University of New York*, 114 N. Y. Supp. (2d) 561, decided since the *Burstyn* case, the court sustained the order of the Regents of the University of New York refusing to license for exhibition a picture film entitled "LaRonde," in connection with which the court, referring to the *Burstyn* case, said:

"We have no doubt, however, both from the area that was expressly left open in that case by the Supreme Court and from the generally accepted power of a state to deal by its municipal law with matters deemed offensive to public morals that the statute delegating the power of licensing to the Regents remains valid to that extent in a proper case."

The summary of Ohio law on the subject as expressed in 8 Ohio Jurisprudence, 468, Section 342, is as follows:

"Liberty of speech, then, is not license to speak anything that one pleases freed from all criminal or civil responsibility. And liberty of press does not extend to the privilege of publishing and disseminating baneful and harmful matter, or of inciting the people to violate laws. The police power, of course, constitutes a legitimate qualification of freedom of speech and press. Certainly this constitutional guaranty does not deprive the state of its power to enact laws for the protection of the public health, morals, safety, and welfare. Accordingly, motion picture censorship has been sustained."

From these expressions of the United States Supreme Court and otherwise, we conclude that, although a motion picture film may not be rejected because of "sacrilegious" expressions or portrayals, there still remains a limited field in which decency and morals may be protected from the impact of an offending motion picture film by prior restraint under proper criteria. There can be no inherent right to publicity which tends to destroy the very social fabric of the community, and consequently in such instances there is no right of free speech or free press to be infringed. In these times of alarming rise in juvenile delinquency and of increasing criminality in this country, attributed by social agencies, at least in part, to the character of the exhibitions put on in the show houses of the country criminal prosecution after the fact is a weak and ineffective remedy to meet the problem at hand. In the war against crime and deliquency there must be some effective defensive weapons against immoral publicity, whereby the social fabric may be protected as it is by law from other methods of attack. The chief problem with reference to publicity by exhibition is to protect that which is of such character as to invest its publisher with a right to publish, and at the same time restrain publicity as to which no such right exists.

As we view it, the United States Supreme Court has not *ipso facto* taken away all community control of moving

pictures by censorship, and this court will not do so under the claim of complete unconstitutionality of censorship laws.

The motion picture, "M", as shown by the certificate was rejected for the following reasons, among other:

"1. There is a conviction that the effect of this picture on unstable persons of any age level could lead to a serious increase in immorality and crime.

"2. Presentation of actions and emotions of child killer emphasizing complete perversion without serving any valid educational purpose. Treatment of perversion creates sympathy rather than a constructive plan for dealing with perversion."

The plaintiff claims that the division abused its discretion in rejecting the motion picture in question and in refusing to grant its approval for exhibition. This court has before it only the script and general description of the content and character of the film as given in the respective briefs of the parties.

The plaintiff claims that the picture is artistic, free from vulgarity and immorality; that its purpose is "to so impress its viewers with the consequences of neglect and apathy that affirmatively moral and righteous attitudes toward the problems dramatized will result"; that it is educational because "it reveals to its audience the sources of five significant contemporary social problems, and then, either proposes a solution, or appeals for public understanding and action"; and that it is not harmful.

The defendant describes the picture as follows:

"This motion picture is filled with brutal crime. Two cold blooded murders are presented, another implied and a third attempted. A schizophrenic killer is treated with sympathy and an underworld boss is depicted as vastly more efficient than the police. Twice, the methods for abducting children on the streets are elaborated."

Incidentally, stipulation eight shows that, for the period, January 1, 1943, to January 1, 1953, 17,741 motion picture films have been approved by the Division of Film Censor-

ship and 59 rejected. Fifteen of the pictures so rejected were later approved, leaving 44 remaining unlicensed.

It is apparent that the lofty purposes of the picture, as expressed by its producers, would appeal only to a limited number of its viewers, whereas the great majority of a promiscuous audience, including children, would be impressed and affected merely by the exhibitionism and the portrayal of evil conduct in society, which the producers admit is so bad as to need radical correction.

The plaintiff claims also that Sections 154-47 to 154-47i, inclusive, General Code, which authorize a prior censorship and restraint, the criteria for acceptable pictures being that they be of a "moral, educational or amusing and harmless character," are by their language and as applied to the plaintiff indefinite, vague and incompatible with and repugnant to the First and Fourteenth Amendments to the Constitution of the United States and Sections 2 and 11, Article I of the Constitution of Ohio.

Plaintiff does not complain so much of the criteria established for the approval of films but attacks the requirement of censorship generally on the ground that such approval must be given before *any* film may be exhibited. The criteria by which films shall be judged under the terms of the statute could doubtless have been made more definite, but where such criteria, expressed in the reverse form, excludes, as it does, only such films as are "immoral," "noneducational" or "nonamusing," or, adding the word, "harmful" as are "immoral *and* harmful," "noneducational *and* harmful," or "nonamusing *and* harmful," the tests are sufficiently definite. No film which has a right to public exhibition can be excluded or rejected. In our opinion, the statutory tests provided may be applied without great difficulty. In this connection, it is interesting to note that the criminal statute of the state defining the felony of exhibiting a picture of "an indecent or immoral nature" is no more definite and certain in terms. Section 13035, General Code, provides:

"Whoever knowingly * * * exhibits * * * motion picture film * * * of an indecent or immoral nature * * * shall be fined not less than two hundred dollars

nor more than two thousand dollars or imprisoned not more than seven years, or both."

Again, Section 13040, General Code, defining the felony of owning and operating a picture machine to exhibit certain types of pictures is as follows:

"Whoever * * * owns or operates * * * a picture machine or other device exhibiting a lascivious, indecent, immoral or impure picture or figure or a picture of crime or lust, or a picture tending to corrupt morals, shall be fined not less than fifty dollars nor more than five hundred dollars, and for each subsequent offense, in addition to such fine, shall be imprisoned not less than thirty days nor more than six months."

In those statutes the definitions of the crimes were made sufficiently clear in order to give notice of the exact limits of the forbidden act to a possible offender. This is not necessarily true as to the test in the aproval or disapproval of a picture film. The criteria by which a picture film may be approved or rejected must be sufficiently definite to enable a reviewing court to properly review the determination of the administrative body passing upon the character of the picture film. See the opinion of Mr. Justice Frankfurter in *Burstyn v. Wilson, Commr., supra,* 532. Plaintiff in this case inferentially accedes to this test by seeking to have this court, as an alternative, review the record and set aside the order of rejection based upon the character and merits of the picture film, and this court has had several occasions to exercise such review. *Epoch Producing Corp. v. Riegel, Dir.,* 113 Ohio St., 697, 150 N. E., 756, and *Hallmark Productions, Inc. v. Dept. of Education, Division of Film Censorship,* 153 Ohio St., 595, 93 N. E. (2d), 13.

We submit that the definitions of the crimes above referred to are no more certain and definite than the criteria in the motion picture censorship code, and that the judge or jury in determining whether there was a violation of those criminal statutes would be required to exercise the same scope of judgment as would the division in the approval or disapproval of a picture film. Besides, if discretion is abused, ample provision is made to correct the mistake on

judicial review. Furthermore, the tests of the censorship statute have over a period of over 40 years acquired a definite and circumscribed meaning.

As stated in defendant's brief, "the standards have enjoined the obscene, the immoral, and that which tended to promote crime or riot, judged in relation to the impact and the audience. The experience of the past decade indicates that not one of the forty-four films rejected fell outside of that test. It is especially pertinent to observe that of the ten outstanding films pointed to by plaintiff as examples of films dealing with questions of great public importance, each has been licensed and exhibited throughout Ohio. This but demonstrates the value of the licensing system. The controversial problems of 'Pinky' may have free access to the minds of Ohio's adults and children; the obscenity of 'Sinful Love,' the immorality of 'My Last Mistress,' the dangerous criminal aspects of 'Apology for Murder' and 'M' may not."

The criteria and standards of the Ohio statute have had the attention of the United States Supreme Court wherein their definiteness has been recognized. In *Mutual Film Corp. v. Industrial Commission, supra,* the court held that the criteria of the statute did leave decision to arbitrary judgment, but were deemed to have acquired precision from the judgment and experience of administrators. It is to be observed that the holding of the court on this branch in the *Mutual* case was not overuled or criticized in the *Burstyn* case. In fact, in that case Mr. Justice Frankfurter, with whom Mr. Justice Burton and Mr. Justice Jackson joined in striking down the term, "sacrilegious," contrasted that indefinite terms with the standards of the Ohio act in these words:

"* * * Even in *Mutual Film Corp. v. Ohio Industrial Comm'n* * * * it was deemed necessary to find that the terms 'educational, moral, amusing or harmless' do not leave 'decision to arbitrary judgment.' Such general words were found to 'get precision from the sense and experience of men.' * * * This cannot be said of 'sacrilegious.' If there is one thing that the history of religious conflicts shows, it is that the term 'sacrilegious'—if by that is im-

plied offense to the deep convictions of members of different sects, which is what the Court of Appeals seems to mean so far as it means anything precisely—does not gain 'precision from the sense and experience of men.'

"• • • Well equipped law libraries are not niggardly in their reflection of 'the sense and experience of men,' but we must search elsewhere for any which give to 'sacrilege' its meaning." See, also, *Winters v. New York*, 333 U. S. 507, 518, 92 L. Ed. 840, 68 S. Ct. 665; *Omaechevarria v. State of Idaho*, 246 U. S. 343, 62 L. Ed. 763, 38 S. Ct. 323; *Waters-Pierce Oil Co. v. State of Texas*, 212 U. S. 86, 53 L. Ed. 417, 29 S. Ct. 220; *Gorin v. United States*, 312 U. S. 19, 85 L. Ed. 488, 61 S. Ct. 429.

Our attention is called to the case of *Gelling v. State of Texas*, supra, as being decisive of the instant cases. As disclosed by the *per curiam* opinion in that case, it was decided on authority of *Joseph Burstyn, Inc. v. Wilson, Commr., supra*, and Winters v. New York, supra, without further statement or reason.

We have already considered the *Burstyn* case. In the *Winters* case, a New York statute made it an offense to publish and distribute publications "principally made up of criminal news, police reports, or accounts of criminal deeds, or pictures, or stories of deeds of bloodshed, lust or crime." In an opinion by Mr. Justice Reed, concurred in by five members of the court, it was held that the statute did not set up a sufficiently definite standard of conduct. Mr. Justice Frankfurther, with the concurrence of Mr. Justice Jackson and Mr. Justice Burton, dissented on the ground that the statute made incitement to crime an offense and for that purpose was sufficiently definite, even though one desiring to avoid violation of the law might be mistaken in attempting to guess the jury's appraisal of the effect of the publication.

In the *Gelling* case, above noted, the appellant was convicted under an ordinance of the city of Marshall, Texas, for exhibiting a picture after being denied a license to do so. The ordinance authorized the licensing board to deny a license to show a motion picture which, *in its opinion*, was

"of such character as to be prejudicial to the best interests of the people of said city." Mr. Justice Frankfurter, concurring in the judgment of reversal, said: "This ordinance offends the due process clause of the Fourteenth Amendment on the score of indefiniteness." This reason for invalidity carries with it the implication that under a proper statute motion pictures may be subjected to reasonable censorship. Conceding that the Marshall ordinance was void for indefiniteness, it does not suggest that the criteria of our licensing statute are insufficient or that it should be stricken down for that reason.

Lastly, plaintiff claims that the fees for the censorship of moving picture films under the statute in question, calculated at the rate of $3 per 1,000 lineal feet of film or portions thereof, are not license fees but an excise tax and therefore discriminatory and unlawful because these fees are in excess of the necessary cost in making the inspection. The record discloses that the fees paid from January 1, 1943, to June 30, 1952, amounted to $2,229,960.59, whereas the operating cost of the division for the same period was a total of $334,364.56, the balance being distributed to the General Revenue Fund of the state and the visual educational rotary fund as provided by statute. It should be observed, however, that the cost of operation of the division does not reflect other heavy governmental and facility costs incidental to the operation of the division. The state is obliged to furnish housing and other facilities as well as the service of the legislative and judicial branches of the state government in carrying on the license system, the cost of all of which is outside the operational cost of the division. See *Globe Security & Loan Co. v. Carrel, Aud.*, 106 Ohio St., 43, 48, 138 N. E. 364.

Besides the plaintiff paid the fee for inspection without protest and does not seek its recovery. Neither has it enjoined the levy of the fee as it could do, if it were illegal under the provisions of Section 12075, General Code. Under such circumstances, the plaintiff is estopped in this action to complain on this point. *King v. Cappellar*, 42 Ohio St., 218; *Wilson v. Pelton*, 40 Ohio St., 306; *State, ex rel. Pulskamp v. Board of County Commrs.*, 119 Ohio St., 504, 164 N. E.

755; *State, on Application of Alter v. Bader, et al., Commrs.*, 56 Ohio St., 718, 47 N. E. 564.

From the evidence before this court we cannot say that the defendant abused his discretion in refusing to approve the picture film in question. The division, representing the public interest, has made its decision and this court cannot find affirmatively that it was in error in so doing. The prayer of the petition is denied.

In case No. 33282, the court disagrees with the position of the respondent. The court, therefore, allows the writ and directs the respondent to re-examine and pass upon the film there involved.

Since in case No. 33283 no order was made by the Division of Film Censorship, the remedy, if any, is mandamus. The petition is dismissed.

Judgments accordingly.

Weygandt, C. J., Middleton, Matthias and Zimmermann, JJ., concur.

Taft and Stewart, JJ., dissent in case No. 33265, but concur in cases Nos. 33282 and 33283.

TAFT, *J.*, dissenting:

I must dissent because bound by the construction put upon the Constitution of the United States by the Supreme Court of the United States. The pronouncements of the law by that court in *Joseph Burstyn, Inc. v. Wilson, Commr.*, 343 U. S. 495, 96 L. Ed. 1098, 72 S. Ct. 777, and the later decision of that court in *Gelling v. Texas*, 343 U. S. 960, 96 L. Ed. 1359, 72 S. Ct. 1002, clearly require the conclusion that the Ohio moving picture censorship statutes are void because of the provisions of the Constitution of the United States.

Stewart, J., concurs in the foregoing dissenting opinion.